



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 267 / 18

In the matter between:

DAVID THABO SEPHEKA

Applicant

and

DU POINT PIONEER (PTY) LTD

Respondent

Considered: In Chambers

Delivered: 9 October 2018

Summary: Leave to appeal – no proper grounds made out – application for leave to appeal dismissed

Bias – bias of judicial officer alleged – principles considered – no bias proven

Costs – leave to appeal and submissions vexatious and frivolous – unfounded allegations of bias – costs *de bonis propriis* awarded

Costs – punitive costs – principles considered – punitive costs appropriate

JUDGMENT – LEAVE TO APPEAL

SNYMAN, AJ

Introduction

- [1] This matter came before me on 16 August 2018, and in an *ex tempore* judgment handed down the same date, I dismissed the applicant's application with costs, and directed that the applicant's attorney shall not be entitled to charge the applicant any fees and/or disbursements relating to the application.
- [2] The applicant had brought an application for an order to the effect that the respondent be compelled to allow the applicant to choose his own legal representative to represent him in retrenchment consultations in terms of section 189 of the Labour Relations Act ('LRA')¹ being conducted at the respondent and which involved the applicant. The application was opposed by the respondent.
- [3] On 29 August 2018, the applicant filed an application for leave to appeal, followed by written submissions as contemplated by Rule 30(3A) of the Labour Court Rules and clause 15.2 of the Practice Manual. The respondent opposed the application and filed its own written submissions. Despite not being provided for in the Rules of this Court or the Practice Manual, the applicant filed replying submissions.
- [4] Clause 15.2 of the Practice Manual further provides that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the applicant's leave to appeal application in chambers.

Defective application

- [5] Considering that judgment was given *ex tempore*, the duty was on the applicant to attend to have the *ex tempore* judgment transcribed, and then present it to me to be edited and approved, as part of considering the application for leave to appeal. The applicant has failed to do so, and has provided no explanation for this failure. I will therefore decide the leave to appeal based on detailed notes I had made of my judgment.

¹ Act 66 of 1995.

[6] Next, and in terms of clause 15.2 of the Practice Manual, the applicant in a leave to appeal application must file written submissions in support of the application for leave to appeal within ten days of filing the application for leave to appeal. The applicant filed his application for leave to appeal on 29 August 2018. This meant that the written submissions were due to be filed by 12 September 2018. The submissions were only filed on 17 September 2018, and were thus 5 (five) days out of time.

[7] The applicant is obliged to comply with the provisions of the Practice Manual, which is not just some or other guideline which parties can adhere to at their leisure. As said in *National Education Health and Allied Workers Union on behalf of Leduka v National Research Foundation*²:

‘The Practice Manual is binding on litigating parties and must be complied with. It is not just a guideline, but an actual prescript. ...’

[8] Therefore, in the case of a failure to comply with the Practice Manual, a litigating party is obliged to show good cause as to why the Court should nonetheless still entertain the matter, which must also be done by way of a proper condonation application.³ The applicant has not applied for condonation, and has not sought to offer any explanation for not complying with the Practice Manual. For this reason alone, the application for leave to appeal should fail.

[9] However, this is a case where there is a bigger picture at stake. The applicant’s approach to this application for leave to appeal was similar to the approach adopted when the original application was argued before me. It is an ill-advised approach, is entirely unacceptable and is part of the reason why I had decided to make the costs award that I did. However, yet again in this application for leave to appeal, despite the applicant being assisted by the

² (2017) 38 ILJ 430 (LC) at para 13. See also *Ralo v Transnet Port Terminals and Others* (2015) 36 ILJ 2653 (LC) at para 9; *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* (2014) 35 ILJ 1672 (LC) at para 11; *Butana v SA Local Government Bargaining Council and Others* [2016] JOL 36088 (LC) at paras 8-9; *Edcon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others: In re Thulare and Others v Edcon (Pty) Ltd* (2016) 37 ILJ 434 (LC) at para 24; *3G Mobile (Pty) Ltd v Raphela NO and Others* [2014] JOL 32479 (LC) at para 36.

³ See *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC) at para 17; *MJRM Transport Services CC v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 414 (LC) at paras 12 – 14; *SA Municipal Workers Union on behalf of Mlalandle v SA Local Government Bargaining Council and Others* (2017) 38 ILJ 477 (LC) at paras 5 – 6.

same counsel, Advocate Mthenjwa, the disregard for the Rules of this Court and what would be irresponsible litigation persists. What has happened in this matter necessitates that a number of issues be dealt with in a comprehensive written judgment, which I will now do.

The merits of the application

[10] From the outset, I state that I am convinced that the content of the applicant's application for leave to appeal and its accompanying written submissions have little to do with instructions emanating from the applicant himself. These pleadings are clearly the design of the legal representatives of the applicant who seem to be driving their own agenda. The application for leave to appeal and submissions have clearly been drawn up by the same counsel I referred to above, Advocate Mthenjwa, however, this time he appears to be also assisted by an Advocate Kwape. This being the case, it is inexcusable and actually irresponsible for the application for leave to appeal and written submissions to contain what it does. This in fact shows a complete disrespect for this Court. As said in *De Lacy and Another v South African Post Office*⁴:

‘... An officer of the court may not without more convey to a court allegations or claims by a client when there is reason to believe that the allegations are untruthful or without a factual basis. This duty is heightened in circumstances where imputations of dishonesty and bias are directed at a judicial officer who ordinarily enjoys a presumption of impartiality. It behoves the legal representative concerned to examine carefully the complaints of judicial bias and dishonesty and the facts, if any, upon which the accusations rest.’

[11] In the application for leave to appeal, it is stated that I was ‘biased and reckless’ in ignoring that the delay occasioned by the respondent in initiating the ‘promised retrenchment’ was unfair. It is irresponsible and simply unprofessional for a party to record, in a pleading, that a judge of this Court is biased and reckless when there is no factual foundation for doing so. Further in the leave to appeal application it is said that I launched a ‘personal attack’ on the applicant's lawyers by denying them a fee and that this determination

⁴ 2011 (9) BCLR 905 (CC) at para 120.

was unwarranted, extremely vicious and *ultra vires*. Yet again, these contentions are entirely baseless and egregious.

- [12] In *Moila v University of the North and Others*⁵ the Court specifically considered allegations by an appellant in the notice of appeal that the Labour Court Judge (Revelas J) 'grossly misdirected' herself, and had made suggestions that the respondent's attorneys were engaged in ploys to undermine the Labour Court's order as well as making false factual allegations in the papers.⁶ In that matter, Revelas J had made a punitive costs order against the appellant. Considering what was contained in the notice of appeal, and all that had gone before in the Court *a quo* where it came to the issue of the punitive costs award, the LAC said the following:⁷

'The tragic part of this matter is that the appellant has not learned from the strictures of the court *a quo* insofar as his conduct is concerned. Far from heeding the warnings issued by Revelas J and moderating his language the appellant has increased and sharpened his vituperation in his notice of appeal and heads of argument. In fact there is a stronger case for attorney and client costs on appeal than in the court *a quo*.'

Similar considerations apply *in casu*.

- [13] The situation is further exacerbated by the written submissions in support of the application for leave to appeal. In this document, it is said the decision I took was 'baseless and immoral'. It is also submitted that the applicant has 'taken the liberty' of looking into my past, it 'emerged' that Bowman Gilfillan and my firm, Snyman attorneys, are 'colleagues' in SASLAW, and thus I personally knew lawyers from Bowmans and met with them in such circles. It is contended that because of this, I was biased and should not have heard the matter. This reasoning is not only ridiculous, but offensive. Most legal representatives that dedicate their practice to employment law are members of SASLAW and interact with one another in the activities of such organization, in seminars and the like. SASLAW is a highly reputable organization ascribing to the highest ethical standards, and in fact nominates the names of *pro bono*

⁵ (2005) 26 ILJ 452 (LAC).

⁶ *Id* at para 51.

⁷ *Id* at para 60.

acting judges that do duty in the Labour Court recesses. Interaction between legal representatives in the context of such an organization is in fact to the benefit of the profession, and not against it. For the applicant to suggest, without any foundation for it, that attorneys that participate in the *bona fide* activities of such an organization in some way conspire to advantage one another is nothing short of being scandalous. In *Moila*,⁸ the Court referred with approval to the following *dicta* from the judgment in *Protea Assurance Co Ltd v Januszkiewicz*⁹:

‘It is wholly unjustified by anything stated or done by Mr Jordaan. If attorneys, as officers of the Court, behave in such a fashion towards each other such conduct can only reflect upon the dignity of the whole legal profession. Furthermore, such conduct brings not only the profession into contempt but indeed the whole system of justice and the Courts. ...

... The gravamen of the matter is not the protection or upholding of the dignity of the individual but of the office he holds, so that judicial officers, officials associated with the functions of the courts and legal practitioners shall not be deterred from doing their duty, nor the courts be influenced extraneously in coming to their decision; and so that the public shall not lose confidence in the courts. The law's concern is for the interest of the public.’

[14] There seems to be a complete, if not deliberate, lack of appreciation on the part of the applicant of the ethical standards, integrity and dignity that is integral to the profession of an attorney or an advocate, no matter what task is being fulfilled, including that of acting as a judge of this Court. This was appreciated in *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others*¹⁰ as evident from the following *dictum* where the Court dealt with a similar kind of attack on a senior and respected advocate at the Johannesburg Bar:

‘... Further, the application represents an unwarranted if not scurrilous attack on the integrity of a senior member of the Johannesburg bar. Clearly, the applicant has no understanding of the concept of independence that is

⁸ (*supra*) at para 55.

⁹ 1989 (4) SA 292 (W).

¹⁰ (2016) 37 ILJ 1704 (LC) at para 14.

fundamental to the practice of any member of the bar. Adv Cassim drew to the applicant's attention the issues of dignity, integrity and self-worth that were necessarily raised by his application for recusal and explained the safeguards in the form both of conscience and the role of the ultimate arbiter, being a commissioner or arbitrator appointed to determine the fairness of any disciplinary action taken against the applicant. The applicant failed to heed these wise words; indeed, he persisted with this application in the face of them. In my view, the applicant's conduct warrants an order for costs on a punitive scale.'

- [15] This Courts has time and time again warned against litigants making unfounded allegations of bias on the part of presiding officers tasked to decide disputes, without cogent proof to substantiate the allegation.¹¹ In the context of employment law, this would be arbitrators tasked to do so under the dispute resolution processes of the LRA, and judges of this Court. As said in *President of the Republic of South Africa and others v South African Rugby Football Union and Others*¹²:

'In applying the test for recusal, Courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare Judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence.

The test should be applied on the assumption that a reasonable litigant would take these considerations into account. A presumption in favour of Judges' impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased.'

- [16] Any allegation of bias, especially on the part of a Judge of this Court, must be substantiated by a proper factual basis, must not be based on mere speculation and conjecture, and must be proved by the party alleging bias.¹³ In

¹¹ See for example *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO and Others* (1998) 19 ILJ 1240 (LC) at para 48; *SMCWU v Party Design CC* [2001] 6 BLLR 667 (LC) at para 12;

¹² 1999 (4) SA 147 (CC) at paras 40 – 41 ('SARFU'). See also *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* (2000) 21 ILJ 1583 (CC) at para 12; *S v Basson* 2007 (3) SA 582 (CC) at para 30; *Ntuli and another v S* [2018] 1 All SA 780 (GJ) at para 16.

¹³ See *Irvin & Johnson (supra)* at para 12; *Basson (supra)* at para 31; *Sappi Kraft (supra)* at para 48.

*Turnbull-Jackson v Hibiscus Coast Municipality and others (Ethekewini Municipality as amicus curiae)*¹⁴ the Court dealt with unfounded allegations of impropriety made against public officers, and held:

‘... I am moved to caution against wanton, gratuitous allegations of bias – actual or perceived – against public officials. Allegations of bias, the antithesis of fairness, are serious. If made with a sufficient degree of regularity, they have the potential to be deleterious to the confidence reposed by the public in administrators. The reactive bias claim stems from unsubstantiated allegations of corruption and incompetence. These are serious allegations, especially the one of corruption. Yes, if public officials are corrupt, they must be exposed for what they are: an unwelcome, cancerous scourge in the public administration. But accusations of corruption against the innocent may visit them with the most debilitating public opprobrium. Gratuitous claims of bias like the present are deserving of the strongest possible censure.’

- [17] What the applicant is in effect doing is to launch a scurrilous attack without any foundation for it, on what the applicant perceives to be an unwanted decision maker that did not give him what he wanted, in the course of seeking leave to appeal, with the hope that this would simply motivate the granting of leave to appeal.¹⁵ This kind approach is ill conceived, and I simply cannot buy into it. The answer to this kind of conduct can hardly be better expressed than in the following *dictum* in *Turnbull-Jackson*:¹⁶

‘This would be the easiest stratagem for the unscrupulous to get rid of unwanted decision-makers: if I insult you enough – whatever enough may be – you are out. This is without substance. It proceeds from an assumption that officials with decision-making power would respond the same way to insults. It ignores the following: the training of the officials; their experience; possibly even their exposure to abuse and insults – from time to time – and the development of coping skills; and other personal attributes, all of which may render them impervious to, or tolerant of, insults. A finding of bias cannot be had for the asking. There must be proof; and it is the person asserting the existence of bias who must tender the proof. The applicant has failed dismally in discharging the *onus* on the so-called reactive bias ...’

¹⁴ 2014 (11) BCLR 1310 (CC) at para 35.

¹⁵ Compare *De Lacy* (*supra*) at para 66.

¹⁶ (*supra*) at para 32.

- [18] In any event, it has been held that judges do bring their life and work experiences with them to the bench, and it is not improper to bring individual perspectives to bear in the adjudication of disputes.¹⁷ Interaction with other law firms and counsel in SASLAW, insofar as this may influence an individual perspective of a judge, is thus not improper and cannot disqualify a judge from hearing a dispute, despite what the applicant may believe.
- [19] Overall considered, the criticism dispensed by the applicant of this Court, as well as the allegations of bias, are without any shred of foundation of fact, and falls far short of establishing bias and disqualification of hearing a matter as contemplated by law. The applicant's contentions are disrespectful, and an unjustified assault on the integrity of this Court, when there is simply no basis for doing so.
- [20] The application for leave to appeal also contained a material factual misrepresentation, compounded by the fact that the applicant did not even take the effort to have the *ex tempore* judgment transcribed. It is said that I took into account the 'forced resignation' of the applicant and that the matter is moot. I did nothing of the sort. I in fact held that I would not consider the issue of mootness as the respondent did not properly raise it, and only referred to it in its heads of argument without any supporting evidence. I simply decided the matter on the merits thereof, as gathered from the pleadings as it stood before me. It is the duty of any legal practitioner not to misrepresent facts to Court. In *Molepo v Passenger Rail Authority of South Africa*¹⁸ the Court held:

'Pleadings should not be a fabrication and legal practitioners have a duty to the court, not only to his client, and must not misrepresent facts to the court. *Jwili v Road Accident Fund* 2010 (5) SA 32 (GNP) ([2010] ZAGPPHC 37) [also reported at [2010] JOL 25488 (GNP) – Ed]; *Tshabangu v Road Accident Fund* [2011] ZAGPJHC 145 (19 October 2011); *Kunene v Road Accident Fund* [2011] ZAGPJHC 194 (8 December 2011); and *Sibeko v Road Accident Fund* [2012] ZAGPJHC 43 (28 March 2012) [also reported at [2012] JOL 28650 (GSJ) – Ed], give a clear indication to attorneys of the expectations of them from the courts.

¹⁷ *SARFU (supra)* at paras 42 – 43; *Irvin & Johnson (supra)* at para 13; *Basson (supra)* at para 30.

¹⁸ [2014] 5 BLLR 456 (LC) at paras 21 – 22.

The above authorities apply equally to notices placed before a court under the hand of an attorney.’

[21] For the above reasons alone, the applicant’s application for leave to appeal constitutes an abuse of the processes of this Court, and should be dismissed.

[22] But even considering the prospects of success of the applicant’s application for leave to appeal, it is simply hopeless. When deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another Court would come to a different conclusion to that of the Court *a quo*, or in other words the appeal would have a reasonable prospect of success.¹⁹ As said in *South African Clothing and Textile Workers Union and Others v Stephead Military Headwear CC*²⁰:

‘It is trite that for an application for leave to appeal to be successful, it is required of the party seeking such leave to demonstrate that there are reasonable prospects that another court, in this instance, the Labour Appeal Court, would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. ...’

[23] In *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*²¹ the Court applied the concept of ‘reasonable prospects of success’ as follows:

‘Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

¹⁹ See Section 17(1)(a) of the Superior Courts Act 10 of 2013; *Molefe v MMARAWU and Others* [2017] ZALCJHB 337 (13 September 2017); *Mbawuli v Commission for Conciliation, Mediation and Arbitration and Others* [2017] ZALCJHB 275 (1 August 2017); *Glencore Operations South Africa (Pty) Ltd v NUM obo Maripane and Others* [2017] ZALCJHB 147 (11 May 2017).

²⁰ [2017] JOL 37932B (LC) at para 7. See also *Seathlolo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (2016) 37 ILJ 1485 (LC) at para 3.

²¹ [2016] JOL 36940 (SCA) at paras 16 – 17.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

[24] The applicant has satisfied none of the above. The applicant has made out no case to the effect that there is a reasonable prospect of success on appeal where it comes to the critical issues dealt with in my judgment, especially those concerning the conclusion that there simply was no legal foundation for the applicant's application, the applicant has a proper alternative remedy in the normal course, and that the applicant in essence sought to bypass the prescribed dispute resolution processes in terms of the LRA. I have dealt with this in detail in my original judgment and there is no need to revisit the issue again. Suffice it to say that there exists no reasonable prospect of success in an appeal Court deciding otherwise.

[25] Further, the applicant has simply regurgitated the same arguments relating to legal representation in retrenchment proceedings, as those presented when the matter was originally argued. These arguments lacked merit then, as they do now. There is no reasonable prospects of success on appeal in this regard.

[26] The applicant has sought to place considerable emphasis in the application for leave to appeal on the judgment of *Workers Labour Consultants obo Khoza and Others v Zero Appliances CC*.²² The judgment is no authority for the proposition that legal representation is allowed as a matter or right in retrenchment consultations. The Court held that it was unfair for the employer in that case to refuse to allow the employee parties any external representation, and insisting that the process must be kept 'in the family', as the Court called it.²³ This is a far cry from the applicant's case in this instance.

[27] It may be added that the judgment in *Zero Appliances* actually illustrates the point I sought to make in my judgment to the effect that this is an issue that must be dealt with in terms of the dispute resolution processes under the LRA

²² [1999] ZALC 193 (7 July 1999).

²³ See para 27 of the judgment.

in the normal course. In *Zero Appliances*, the Court was actually dealing with an unfair retrenchment case, and held that the retrenchment of the employees was unfair because, *inter alia*, they were denied any representative and this led to them not being properly consulted.²⁴ The Court then afforded the employees relief under the LRA as a result of this unfairness. The point is that the same avenue was always open to the applicant had he been retrenched and had he believed that refusing to consult his legal representative rendered his retrenchment unfair. The applicant was not able to provide any answer to the difficulty this situation caused his application.

[28] But importantly, and where it comes to the applicant's intention to appeal, the issue of mootness becomes relevant. The respondent has specifically raised this in its answering submissions. The contention that the matter is moot arises from what now appears to be undisputed, that the retrenchment exercise applying to the applicant was not pursued to finality, the applicant has in fact resigned from the employment of the respondent, and is pursuing an unfair constructive dismissal dispute in the CCMA. There is considerable force in the respondent's contention that the matter is moot as a result. The fact is there is simply no longer any live *lis* between the parties relating to representation in a retrenchment consultation, as not only does no such consultation exist, but the employment relationship between the parties has since ended.

[29] The pertinent question is what possible practical effect could the order sought in the notice of motion in the applicant's application still have, and the answer has to be none at all. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*²⁵ the Court said:

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law'.²⁶

²⁴ Id at para 29.

²⁵ 2000 (2) SA 1 (CC) at para 21 footnote 18.

²⁶ See also *City of Cape Town v SA Municipal Workers Union on behalf of Abrahams and Others* (2012) 33 ILJ 1393 (LAC) at para 11; *Multichoice Africa (Pty) Ltd v Broadcasting Electronic Media & Allied Workers Union and Others* (2012) 33 ILJ 177 (LAC) at para 16; *SA Transport and Allied Workers Union v ADT Security (Pty) Ltd* (2011) 32 ILJ 2112 (LAC) at paras 4 – 5. In *Sun International*

[30] The applicant's two counsel, had they simply applied due and proper care and discharged their duties in a professional manner, must have appreciated that any further conducting of this matter in an appeal court was bound to fail because the matter was moot. However, the fact that it is still being pursued indicates to me that, what this is all about is, in reality only the issue of legal fees. This kind of approach is simply unacceptable. In *Mashishi v Mdladla NO and Others*²⁷ the Court recently dealt with this consideration in the following manner:

'... The only reason that I have prepared a written judgment is to draw the attention of practitioners and others with right of appearance in this court to the abuse of this court's process that continues, notwithstanding prior indications from the bench that given the court's limited resources and the backlogs that have built up (especially in relation to the motion rolls), consideration would be given to making punitive costs orders and orders to the effect that practitioners forfeit their fees where that is appropriate.

Judge Owen Rogers recently suggested that it is improper for counsel to act for a client in respect of claim or defence which is hopeless in law or on the facts. (Rogers O 'The Ethics of the Hopeless Case' December 2017 30(3) *Advocate* 46.) Although these assertions are directed primarily at counsel (the article having been published in the South African Bar Journal), the same principles apply to attorneys, and indeed all those who have the right of audience before a court.) By this he means that counsel must be able to formulate a coherent argument comprising a series of logical propositions which have a reasonable foundation in law or on the facts and which, if they are all accepted by the court, will result in a favourable outcome, even if counsel believes that one or more of the essential links are likely to fail. But counsel acts improperly when she is 'quite satisfied' that one or more of them will fail. In particular, there is an ethical obligation on counsel to ensure that only 'genuine and arguable' cases are ventilated, and that this be achieved without delay (at 51).'

Ltd v SA Commercial Catering and Allied Workers Union (2017) 38 ILJ 1799 (LAC) at para 21 the Court described it as 'The appellant has in effect asked for an advisory opinion as to future conduct'.

²⁷ (2018) 39 ILJ 1607 (LC) at paras 13 – 14.

- [31] I fully ascribe to this reasoning in *Mashishi*. If it is applied to the current matter, even the original application should never have been pursued, and most certainly not the current application for leave to appeal. The two counsel concerned should have advised the applicant that further legal action is hopeless, and should be left to die a natural death. What has however been allowed to perpetuate is nothing else but an abuse of process, causing an undue strain on the already stretched resources of this Court.
- [32] The judgment in *Mashishi* also puts paid to the applicant's contention that depriving a legal representative of charging a client a fee is *ultra vires* conduct on the part of this Court. There can be no doubt that this Court has the power to grant such an order, should circumstances so require, as a mark of displeasure for the kind of unacceptable conduct described in *Mashishi*.²⁸ The applicant's contentions of *ultra vires* conduct in this regard is entirely unfounded, and this case has no prospects of success on appeal.
- [33] In sum therefore, the applicant has dismally failed to make out a case justifying the granting of leave to appeal. The applicant has failed to comply with the Rules of this Court and the Practice Manual. The applicant's counsel have conducted themselves in a manner that is disrespectful, unprofessional, unduly attacking the integrity of this Court in a manner deserving of censure. None of the grounds sought to be made out in the application for leave to appeal have any reasonable prospects of success on appeal. And finally, to boot, the matter is moot as well.
- [34] The application for leave to appeal therefore falls to be dismissed.

Costs

- [35] In its submissions, the respondent has stated that the current application for leave to appeal is an abuse of process, and the applicant's legal representatives should be sanctioned with a punitive costs award, *de bonis propriis*. Of course, this Court is empowered to award costs *de bonis*

²⁸ See also section 162(2) of the LRA, which reads: When deciding whether or not to order the payment of costs, the Labour Court may take into account ... (b) the conduct of the parties- (i) in proceeding with or defending the matter before the Court; and (ii) during the proceedings before the Court.

propriis.²⁹ I have little hesitation in concluding that this is indeed a matter where such a costs order is not only justified, but necessary, for the reasons to follow.

- [36] Considering when costs orders *de bonis propriis* are justified, I refer to *Stainbank v SA Apartheid Museum at Freedom Park and Another*³⁰ where the Court said:

‘Although the Courts have the power to award costs from a legal practitioner’s own pocket, costs will only be awarded on this basis where a practitioner has acted inappropriately in a reasonably egregious manner. However, there does not appear to be a set threshold where an exact standard of conduct will warrant this award of costs. Generally, it remains within judicial discretion. Conduct seen as unreasonable, wilfully disruptive or negligent may constitute conduct that may attract an order of costs *de bonis propriis*.’

- [37] In *Candy and Others v Coca Cola Fortune (Pty) Ltd*³¹ The Court held:

‘In terms of s 162(3) of the LRA, ‘the Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court’. Clearly this would include the power to make a costs award *de bonis propriis* against a representative. In *Moloi & another v Euijen & another*, the court said that ‘costs *de bonis propriis* are awarded against legal practitioners in cases which involve delinquencies such as dishonesty, wilfulness or negligence in a serious degree’. Factors for consideration referred to in *Moloi* were whether the representative acted dishonestly in his dealings with the court, whether he indulged in contemptuous conduct, whether he perpetrated fraud on the court, whether he misled or placed false evidence before the court and whether his conduct smacked of wilfulness or negligence to a serious degree. The court in *Indwe Risk Services (Pty) Ltd v Van Zyl: In re Van Zyl v Indwe Risk Services (Pty) Ltd* said that ‘where the court is of the view that there is a want of bona fides or where the representative had acted negligently or even unreasonably’, the court would consider awarding costs against such a representative.’

²⁹ Section 162(3) of the LRA.

³⁰ 2011 (10) BCLR 1058 (CC) at para 52. See also *General Workers Union of South Africa and Others v Ramade Plastics (Pty) Ltd* [2010] ZALC 268 (11 February 2010) at para 13; *Mahlangu and others v Femco (Pty) Ltd* [1999] ZALAC 18 (1 September 1999) at para 11.

³¹ (2015) 36 ILJ 677 (LC) at para 47

- [38] It must also be considered that legal practitioners practising in this Court are part of a profession that which demands complete professionalism, honesty, reliability and integrity from its members, and who owe the court a duty to be truthful, and maintain an appropriate level of professionalism and courtesy.³² Where legal practitioners make unsustained and unwarranted attacks on other litigants, or witnesses or judicial officers, it displays the kind of unprofessionalism justifying a costs award *de bonis propriis*.³³ Costs *de bonis propriis* also constitute a conveyance of a court's displeasure when these noble objectives are flouted or not adhered to.³⁴
- [39] In this instance, the manner in which the applicant's counsel chose to pursue the application for leave to appeal is certainly inappropriate in a reasonably egregious manner as contemplated by the above *dictum* in *Stainbank*. This conduct ticks all the boxes where it comes to justifying a costs order *de bonis propriis*. Summarized as succinctly as possible, the conduct was contemptuous, unreasonable and completely lacking in *bona fides*. Also, false statements were made in the application for leave to appeal and accompanying submissions.³⁵ The application was pursued in circumstances where it must be abundantly clear to any one exercising a modicum of diligence and care that it should never have been pursued.
- [40] In addition, after the respondent filed its written submissions, counsel for the applicant was forewarned and had the opportunity to then perhaps simply bring matters to an end by withdrawing the application. But counsel pressed on, undeterred, which also supports the granting of costs *de bonis propriis*.³⁶ Also relevant in this regard is that the matter was still being pursued, when it was clearly moot, which is the same basis on which the Court in *Mahlangu and another v Mahlangu and Others*³⁷ decided to award costs *de bonis propriis*.

³² See *Candy (supra)* at para 49; *Molepo (supra)* at paras 20-21.

³³ *De Lacy (supra)* at para 117.

³⁴ *SA Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) at para 54; *De Lacy (supra)* at para 121.

³⁵ Compare *Molepo (supra)* at para 23.

³⁶ *Candy (supra)* at para 46.

³⁷ [2017] JOL 37994 (SCA) at para 20.

[41] Next, it must be considered when punitive costs is justified. In this regard, and also in *Stainbank*,³⁸ the Court held:

‘Punitive costs have been granted when a practitioner instituted proceedings in a haphazard manner; wilfully ignored Court procedure or rules; presented a case in a misleading manner; and forwarded an application that was plainly misconceived and frivolous.’

And in *Geerdts v Multichoice Africa (Pty) Ltd*³⁹ it was said:

‘In awarding costs on the attorney and client scale, the Court has a discretion, to be exercised judicially upon a consideration of all the facts. As between the parties, it is a matter of fairness to both sides. Vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for his opponent to be out of pocket in the matter of his own attorney and client costs ...’

[42] Punitive costs will also be justified where a litigant adopts what is called an ‘unconscionable stance’,⁴⁰ or conducts him/herself in an unacceptable manner in the course of the proceedings.⁴¹ Punitive costs also serve as a mark of a court’s displeasure.⁴² The failure to maintain a reasonable standard of workmanship and skill in the drafting of documents and bringing of a case to court may also justify a punitive costs award, where the ultimate cause fails as a result of this failure.⁴³

[43] Again, and *in casu*, all the boxes justifying punitive costs are ticked. The provisions of the Practice Manual were ignored and the *ex tempore* judgment was not even transcribed, showing a disregard for regulatory provisions. The application for leave to appeal was indeed presented in a misleading manner, and was no doubt frivolous. There was contemptuous conduct, and an unwarranted attack on the integrity of this Court. In fact, there are many

³⁸ (*supra*) at para 53.

³⁹ [1998] ZALAC 10 (29 June 1998) at para 48.

⁴⁰ *Du Toit NO v Errol Thomas NO and Others* [2016] JOL 36040 (SCA) at para 13.

⁴¹ *Moila (supra)* at para 60; *Maluleke and Others v Johnson Tiles (Pty) Ltd* (2008) 29 ILJ 2606 (LC) at paras 31 – 32.

⁴² *Chairperson, Gauteng Liquor Board (supra)* at para 48.

⁴³ *Mphahlele v Ephraim Mogale Municipality* (2018) 39 ILJ 879 (LC) at para 14; *January v Standard Bank of South Africa Limited* [2015] JOL 34176 (ECG) at para 79.

comparisons between the matter *in casu* and the judgment in *Geerds*,⁴⁴ where the Court indeed awarded punitive costs.

[44] In fact, it would seem that Advocate Mthenjwa has a penchant for flouting Court rules and conducting frivolous litigation, and then accusing the presiding Judge of impropriety. In *Mthenjwa v Steyn and Another*⁴⁵, advocate Mthenjwa sought consent to institute legal proceedings against Judge Elize Steyn of the Western Cape Division of the High Court. This however required, in terms of section 47(1) of the Superior Courts Act⁴⁶, the leave of Head of the Court to do so. Advocate Mthenjwa not only failed to comply with this provision, but did not even disclose the nature of the litigation he intended to institute against Judge Steyn. As part of the reasoning in dismissing the application with costs, Tlaletsi JP said the following:⁴⁷

‘There is one general observation I wish to make. The applicant is quite indifferent in his conclusions. His incautiousness was expressed in his papers and during his address. He accused the first respondent of racism, “*attempted bribe*”, that “... *it brings out her deceitful character...*” These are strong allegations which should not be lightly made against a person, worse against a judicial officer.’

Advocate Mthenjwa did not heed what is clearly a warning about this kind of conduct, and has in essence done the same, in this matter, again. This is certainly deserving of censure.

[45] Finally, applying what was said in *Mashishi*, and for in essence the same reasons ventilated above, I am once again compelled to order that the applicant’s legal representatives are not entitled to charge the applicant any fees or disbursements for the application for leave to appeal.

[46] In summary, I am satisfied that this is a case where a special costs award is justified. This is a case where the applicant’s counsel must be ordered to pay the costs of the application for leave to appeal, *de bonis propriis*, on the scale as between attorney and own client. Further, their own client should not be left

⁴⁴ See para 49 of the judgment.

⁴⁵ [2017] ZAWCHC 161 (30 November 2017).

⁴⁶ Act 10 of 2013.

⁴⁷ Id at para 29. The unacceptable conduct on the part of advocate Mthenjwa in the course of the litigation can be found in paras 19 – 23 of the judgment.

out of pocket by these ill-advised legal proceedings, and it is also justified that no fee or disbursement may be charged to the applicant for this.

Order

[47] In the premises, I make the following order:

1. The applicant's application for leave to appeal is dismissed;
2. The applicant's counsel, advocate Sepheka Mthenjwa and advocate Katlego Kwape are ordered to pay the costs of the application, *de bonis propriis*, on the scale as between attorney and own client, the one paying the other to be absolved;
3. The applicant's attorneys and counsel shall not be entitled to charge the applicant any fee or disbursement for the application for leave to appeal.

Sean Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:

Advocates S Mthenjwa and K Kwape

Instructed by:

Braimoh Attorneys

For the Respondent:

Advocate E Richards

Instructed by:

Bowman Gilfillan Inc Attorneys

LABOUR COURT